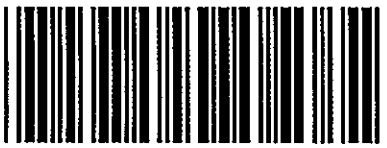

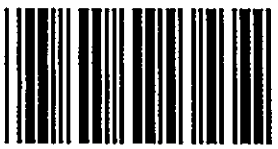

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DONALD J. TRUMP, Plaintiff/Appellant, v. TIMOTHY L. O'BRIEN, TIME WARNER BOOK GROUP INC., and WARNER BOOKS INC., Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO. A-6141-08T3 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: CAMDEN COUNTY DOCKET NO. CAM-L-545-06 Sat Below: HON. MICHELE M. FOX, J.S.C.

BRIEF OF DEFENDANTS/RESPONDENTS TIMOTHY L. O'BRIEN, TIME WARNER BOOK GROUP INC., AND WARNER BOOKS INC., IN OPPOSITION OF APPEAL

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Defendant Timothy L. O'Brien and defendants Time Warner Book Group Inc. and Warner Books Inc. (the "Warner defendants," and, with O'Brien, the "defendants") submit this brief in opposition to plaintiff Donald J. Trump's appeal of the trial court's order granting summary judgment for defendants and dismissing plaintiff's complaint with prejudice.

PRELIMINARY STATEMENT

Trump claimed below that O'Brien's reporting in the book TrumpNation: The Art of Being the Donald ("TrumpNation" or the "Book"), published in October 2005, and his statements at promotional events, defamed him by citing and relying upon three confidential sources with direct knowledge of Trump's finances, who had worked closely with him for years, and who estimated that Trump's net worth was between $150 million and $250 million. O'Brien reported these estimates — in a chapter discussing the difficulty of pinpointing Trump's net worth — alongside other estimates in the billions, including those of Trump, Trump's CFO, and Forbes Magazine. O'Brien included Trump's denial immediately after citing the sources' estimates.

There is no doubt that the trial court properly concluded that Trump had failed to adduce clear and convincing evidence of actual malice (i.e., knowledge of falsity or reckless disregard thereof). Given the vast uncertainty and exaggeration surrounding Trump's private holdings and debt — much of which

Trump has fostered himself and which has been the subject of numerous press reports – it is likely that no statement about Trump's net worth could be defamatory. Indeed, in his deposition, Trump indicated that his net worth fluctuated by the day based on his "own feelings," demonstrating some of the inherent difficulties in estimating it.

Against this backdrop, as the trial court concluded, O'Brien's citation of the nearly identical net worth estimates of three separate, independent sources, all of whom O'Brien verified had direct knowledge of Trump's finances and who previously had provided reliable information on numerous aspects of these finances, certainly could not amount to actual malice. The trial court properly found that Trump had failed to point to clear and convincing evidence that O'Brien knew the sources' estimates were false or entertained serious doubts about their accuracy. And under well-established case law, Trump's allegations of insufficient investigation and common-law malice, even if accepted as true, could not demonstrate actual malice.

On appeal, plaintiff once again tries the same approach he used below, listing the same claimed disputes of fact, and asserting that O'Brien possessed information disproving the sources' estimates. But in the end, these factual disputes – such as the alleged value of a single asset (the West Side Yards) – are immaterial to actual malice because they do not

demonstrate, even accepting Trump's version, that O'Brien seriously doubted his sources' estimates. And all of the information that Trump claims O'Brien had showing the sources' estimates were false came from Trump himself. Trump essentially is claiming that O'Brien should have taken his word as gospel; O'Brien was not required to do so.

The trial court also properly concluded that summary judgment was appropriate for the Warner defendants, both because there is no primary liability as to O'Brien and, even if the claim against O'Brien had survived, because there is no basis for vicarious liability. A publisher may be held vicariously liable only for the acts of its agent. But here, based on the undisputed facts, O'Brien functioned as the prototypical independent contractor and not an agent: He controlled the research and drafting of the Book, and the publisher simply could accept or reject the manuscript; his contract gave him responsibility for the Book's accuracy; he provided his own workspace and equipment; and he was paid a flat fee plus royalties and not treated as an employee for tax purposes. Indeed, plaintiff has cited no case in which a book publisher was held vicariously liable for an author's statements. Absent any evidence that O'Brien was the Warner defendants' agent, the trial court properly concluded that no reasonable jury could find the Warner defendants vicariously liable.

STATEMENT OF FACTS

O'Brien is a seasoned journalist with graduate degrees in journalism, business, and U.S. history from Columbia University.[1] (Pa114 ¶ 1.) He has reported on business news for publications including The New York Times ("The Times") and The Wall Street Journal, and currently serves as Editor of the Sunday Business section of The Times. (Id.) O'Brien has covered Trump for many years, including in a chapter of his 1998 book entitled Bad Bet: The Inside Story of the Glamour, Glitz, and Danger of America's Gambling Industry. (Pa115 ¶ 4.)

During 2004, O'Brien wrote several articles for The Times about Trump, focusing on efforts to restructure Trump's casino companies to avoid bankruptcy and related issues. (Id. ¶ 5.) In an article published on September 8, 2004, O'Brien reported Trump's own estimates of his net worth as ranging between $2 billion and $5 billion, while noting that "three people who have had direct knowledge of [Trump's] holdings . . . estimated that Mr. Trump's wealth, presuming that it is not encumbered by heavy debt, may amount to about $200 million to $300 million." (Pa336.) O'Brien promised the sources confidentiality with the understanding that they feared retribution from Trump if their

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[1] Although plaintiff's Statement of Facts contains numerous mischaracterizations (see Pb7-22), defendants' brief – in the Statement of Facts and elsewhere – addresses only those facts relevant to the merits of this appeal.

identities were revealed. (Pa116-17 ¶¶ 6, 8.) Trump did not sue O'Brien or The Times over the 2004 articles and cooperated with O'Brien's subsequent reporting for the Book.[2] (Pa681 at 668:22-23, 669:7-14.)

In December 2004, O'Brien signed a book contract with defendant Warner Books Inc.[3] (Pa116 ¶ 8; Pa512.) Under the contract, O'Brien licensed the Book to Warner Books in return for an advance and royalties on sales of the Book. (Pa501 ¶¶ 1-3.) O'Brien had responsibility for the accuracy of the Book, and Warner Books could accept or reject the manuscript upon completion. (Pa505-07, 509-10 ¶¶ 6, 8, 17-18.) Over the next six months, O'Brien interviewed Trump many times for the Book, and O'Brien (or his research assistant) conducted more than 100 additional interviews, including re-interviews of sources from earlier reporting. O'Brien also relied on his prior reporting and extensive documentary research conducted for the Book.

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[2] In a moment of candor in March 2005, and prior to having any motive to overstate the alleged impact of O'Brien's reporting on him, Trump admitted to O'Brien that the 2004 article about his net worth, which cited the confidential sources, had no impact on him: "You get a bad story and it's too bad. And then the next day — I'll give you an example: your story that I hated. . . . I was going to sue you. And then a few days later . . . 'What did he write?' . . . Especially me . . . it just gets all mushed up in the formula." (Pa1764 (emphasis added).)

[3] Warner Books Inc. is now known as Grand Central Publishing and is a subsidiary of Hachette Book Group USA, Inc., which formerly was known as Time Warner Book Group Inc.

(See, e.g., Pa116-17 ¶ 8; Book at 242, 249-63; Pa701-10, Pa715-37.)

In October 2005, the Warner defendants published TrumpNation.[4] (Pa117 ¶ 9; see Book.) The sixth of the Book's eight chapters described the difficulty of pinpointing Trump's net worth and reported various net worth estimates. (Book at 143-74.) Chapter Six's discussion of the different valuations began with estimates published by Forbes Magazine in its annual lists purporting to identify the nation's wealthiest individuals. The Book reviewed Trump's appearances on (and absences from) the Forbes 400 list over a 23-year period, including Trump's public disagreements with Forbes. At the time of the Book's publication, Forbes's most recent list estimated Trump's worth at $2.6 billion. (Id. at 146-52.)

As the Book explained, Trump also provided O'Brien with widely varying estimates of his net worth within a very short time. When Trump and O'Brien spoke in August 2004, Trump stated that his net worth was between $4 billion and $5 billion. (Id. at 153.) But, as noted in the Book, "later that same day in August, [Trump] said his casino holdings represented 2 percent of his wealth, which at the time gave him a net worth of about

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[4] The Book had sold approximately 17,000 copies as of June 30, 2008, the date of the last royalty statement produced by defendants. (Pa762.)

$1.7 billion." (Id.) Asked about his net worth seven months later, on March 5, 2005, Trump stated: "'I would say six [billion]. Five to six. Five to six.'" (Id. (quoting Trump in O'Brien's interview on March 5, 2005).) Yet around the same time, "on the nightstand in [O'Brien's] bedroom at Donald's Palm Beach club was a glossy brochure that said [Trump] was worth $9.5 billion." (Id. at 154.)

The Book also reported estimates provided to O'Brien by Allen Weisselberg, the Chief Financial Officer ("CFO") of The Trump Organization, during a meeting in April 2005. Weisselberg "claimed Donald was worth about $6 billion," an assessment detailed through a listing of Trump's holdings (according to Weisselberg) in a prominently displayed chart. (Id. at 154-55.)

Then, in a paragraph on the same page as Weisselberg's estimate, and across from the chart, O'Brien reported that "[t]hree people with direct knowledge of Donald's finances, people who had worked closely with him for years, told [O'Brien] that they thought [Trump's] net worth was somewhere between $150 million and $250 million."[5] (Book at 154.) O'Brien based

[5] In his brief, plaintiff misquotes the Book, suggesting that O'Brien reported the sources' estimates as his own, when in fact he attributed the estimates to the sources. (Pb17.) Similarly, plaintiff claims in his brief that O'Brien wrote that Trump "was not remotely close to being a billionaire." (Id.) In fact, what O'Brien actually reported was that "none of these people [i.e., the three sources] thought [Trump] was remotely close to being a billionaire." (Book at 154.)

these estimates on re-interviews of the same three confidential sources he cited in the September 2004 Times article. (Pa117 ¶ 8.)[6] When asked for his response to these estimates, Trump did not take issue with the sources' information or analysis, but simply stated (as quoted in the Book immediately following the reference to the sources' estimates): "'You can go ahead and speak to guys who have four-hundred-pound wives at home who are jealous of me, but the guys who really know me know I'm a great builder.'" (Book at 154 (quoting Trump in O'Brien's interview on April 25, 2005).) The Book ultimately did not endorse any particular estimate of Trump's net worth, but illustrated how Trump and others furnished O'Brien with estimates spanning over $9 billion within a short timeframe, driving home the uncertainty in any such estimate, and suggesting appropriate skepticism of Trump's own varying estimates.

On October 23, 2005, The Times published an excerpt of Chapter Six of the Book, including a similar statement regarding

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[6] Shortly after this Court's ruling that the newsperson's privilege protected the sources' identities, Trump v. O'Brien, 403 N.J. Super. 281, 298, 302 (App. Div. 2008), O'Brien produced 50 pages of notes of interviews with the three confidential sources. Consistent with the Court's ruling, the notes were redacted to shield information that could reveal the sources' identities. (See Pa768-88 (Source 1), Pa789-93 (Source 2), Pa794-815 (Source 3).) Although plaintiff was given the opportunity to depose O'Brien concerning these notes following their production, plaintiff expressly declined to do so prior to the close of fact discovery. (Pa3654 n.1.)

the sources' estimates of Trump's net worth and many of the estimates of Trump's net worth in the billions.[7] (Pa117 ¶ 9; Pa741-61.)

PROCEDURAL HISTORY

Plaintiff filed his complaint against O'Brien and the Warner defendants on January 19, 2006, alleging that the Book defamed him by "grossly misrepresent[ing] [his] net worth," and seeking $5 billion in damages. (Pa9, Pa27.) On May 15, 2006, pursuant to R. 4:6-2(e), defendants moved to dismiss for failure to state a claim upon which relief may be granted, arguing that plaintiff's statements were not defamatory as a matter of law and that the pleadings were inadequate to state a claim. (Pa842-69.) The trial court denied defendants' motion on August 18, 2006, emphasizing that it did so under the motion-to-dismiss standard and that the result could be different at summary judgment. (Pa888-90, Pa896-97.) Defendants sought interlocutory review, which the Appellate Division denied on October 12, 2006. (Pa898.)

During discovery, plaintiff identified nine allegedly defamatory written and oral statements relating to the Book and

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[7] In addition to printing the sources' estimates of $150 million to $250 million (as reported in the Book), the excerpt included a parenthetical updating the estimates given developments with Trump's Atlantic City holdings: "Donald's casino holdings have recently rebounded in value, perhaps adding as much as $135 million to [the sources'] estimates." (Pa751.)

the promotion of the Book. (Pa1020-21.) All nine statements focused on Trump's net worth and related to the accuracy of the confidential sources' estimates.

During discovery, plaintiff sought the identities of O'Brien's three confidential sources and other documents relating to the researching, writing, and editing of the Book. (Pa908; Pa927-33; Pa943-48.) Defendants asserted the newsperson's privilege in response to these requests, and plaintiff then filed a motion to compel, which the trial court granted. (Pa951-53.)

On October 24, 2008, this Court reversed the trial court's ruling and held that O'Brien's confidential sources' identities were absolutely protected under both New Jersey's newsperson's privilege and New York's shield law. Trump, 403 N.J. Super. at 298-300. This Court further held that the other materials Trump sought, including those related to the researching, writing, and editing of the Book, were absolutely protected under New Jersey law, and subject to a qualified privilege under New York law, which Trump had failed to attempt to overcome through a particularized showing. Id. at 301-02. Trump did not make any subsequent attempt through discovery to overcome the qualified privilege applicable under New York law to these research and editorial materials.

On March 20, 2009, defendants filed two motions for summary judgment, each of which provided an independent basis for dismissing plaintiff's complaint. The first motion sought summary judgment on actual malice. In a thorough and well-reasoned decision read from the bench, the trial court granted this motion and dismissed plaintiff's complaint with prejudice. (T41-22 to 42-8, T56-12 to 15; Pa6-7.) The court held that under both New Jersey and New York law, O'Brien was permitted to rely on the confidential sources in opposing summary judgment; that O'Brien's publication of the sources' estimates, amongst other estimates of Trump's net worth, including Trump's own, was a significant factor undermining actual malice; that plaintiff had not pointed to evidence that would allow a fact finder to conclude by clear and convincing evidence that O'Brien believed the statements he published were false or that he published them with reckless disregard for their falsity; and that the allegations of prior negative reporting and derogatory comments by O'Brien, as well as alleged deficiencies in O'Brien's research, could not establish actual malice under well-settled case law. (T33-6 to 42-8.)

As to the Warner defendants, Trump clarified during summary judgment briefing that he had abandoned any theory of direct liability against the publisher. (T42-23 to 43-4.) The trial court held that the Warner defendants also could not be liable

under a theory of vicarious liability, both because O'Brien himself was not liable, and because the undisputed evidence showed that O'Brien was an independent contractor. (T51-10 to 56-11.)

Defendants also moved for summary judgment on the grounds that there was absolutely no evidence of any damage to plaintiff arising from defendants' allegedly defamatory statements, and that the statements at issue could not support an award of damages under a theory of libel per se or slander per se. Having already granted defendants' other summary judgment motion, the trial court denied this second motion as moot (without prejudice). (T57-5 to 10.)

ARGUMENT

I. The Trial Court Applied the Correct Standard in Granting Summary Judgment

A. Plaintiff Was Obligated to Adduce "Clear and Convincing" Evidence of Actual Malice

1. Actual Malice Standard

Under well-settled law, a public figure suing for defamation must prove actual malice, defined as publication of the challenged material "[1] with knowledge that it was false or [2] with reckless disregard of whether it was false or not." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); see, e.g., Costello v. Ocean County Observer, 136 N.J. 594, 612

(1994); Freeman v. Johnston, 84 N.Y.2d 52, 56 (1992).[8] The actual malice inquiry is subjective, focusing on the defendant's attitude towards the truth or falsity of his publication. See Lawrence v. Bauer Publ'g & Printing Ltd., 89 N.J. 451, 467 (1982); Khan v. N.Y. Times Co., 710 N.Y.S.2d 41, 43-44 (App. Div. 2000).

To demonstrate a defendant's knowledge of falsity, a plaintiff must adduce evidence that the defendant subjectively believed the challenged statement was false at the time of publication. Costello, 136 N.J. at 615; Khan, 710 N.Y.S.2d at 43. To demonstrate reckless disregard, the plaintiff must have evidence that "the defendant in fact entertained serious doubts about the truth of the statement or that [the] defendant had a subjective awareness of the story's probable falsity." Costello, 136 N.J. at 615 (citation omitted); accord Sweeney v. Prisoners' Legal Servs. of N.Y., 84 N.Y.2d 786, 792-93 (1995); (see also T17-16 to 19 ("'[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would

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[8] In the prior appeal involving the newsperson's privilege, this Court declined to decide whether New Jersey or New York law applied. Trump, 403 N.J. Super. at 304-05. The trial court followed this Court's lead and applied both states' laws, concluding that the results would be the same under either. (T16-17 to 17-7.) Therefore, we cite both states' law in this brief.

have investigated before publishing.'") (quoting St. Amant vs. Thompson, 390 U.S. 727, 731 (1968))).

2. Clear and Convincing Evidence Standard

At summary judgment in a defamation case, although the movant has the ultimate burden of proof, a public figure must demonstrate the existence of "clear and convincing" evidence of actual malice to proceed to trial. See Anderson v. Liberty Lobby, 477 U.S. 242, 256 (1986); Costello, 136 N.J. at 614; Freeman, 84 N.Y.2d at 56-57; see also R. 4:46-2; N.Y. C.P.L.R. § 3212[b]. "Clear and convincing" is a higher standard of proof than the "preponderance of the evidence" standard and requires "evidence 'so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'"[9] State v. Hodge, 95 N.J. 369, 376 (1984) (quoting In re Boardwalk Regency Corp., 180 N.J. Super. 324, 339 (App. Div. 1981)). The court below correctly articulated the clear and convincing standard (T17-25 to 19-6, T33-6 to 13) and concluded that the record could not support a reasonable jury finding of actual malice under this standard (T41-22 to 42-8, T56-12 to 15).

[9] New York courts use the synonymous term "convincing clarity." See, e.g., Freeman, 84 N.Y.2d at 56.

B. Summary Judgment Is Required Where, As Here, There Are No Genuine Issues of Material Fact

Courts must grant summary judgment where there is "no genuine issue as to any material fact challenged." R. 4:46-2(c). Issues as to non-material, insubstantial, or irrelevant facts do not preclude summary judgment. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) ("[A] non-moving party cannot defeat a motion for summary judgment merely by pointing to *any* fact in dispute."); Johnson v. City of Hackensack, 200 N.J. Super. 185, 189 (App. Div. 1985).

In his moving brief, plaintiff alludes to a right to have his claim decided by a jury (Pb1, Pb23, Pb25-26), but no such right exists absent issues of disputed material fact. See Brill, 142 N.J. at 537 ("[T]he right to a jury trial has never prevented our courts from granting summary judgment in an appropriate case."). It is the trial court's responsibility at summary judgment to determine whether disputed facts are material. See, e.g., id. at 523. Although the court below recognized various disputed facts (see, e.g., T14-12 to 23, T24-19 to 21, T27-4 to 23, T29-11 to 23, T30-3 to 7), it concluded they were not material (T33-6 to 13, T42-1 to 8). Plaintiff's conclusory statement that resolution of certain factual disputes "was central to the actual malice determination" (Pb24) ignores what happened below. The trial court took plaintiff's factual

allegations as true and drew all justifiable inferences in his favor (T20-23 to 21-4), and still found no clear and convincing evidence of actual malice, i.e., any factual disputes were immaterial to the actual malice determination (T38-8 to 16).

The function of summary judgment is all the more important in defamation cases, where there are significant First Amendment issues at stake. Courts in New Jersey and New York therefore have articulated the importance of resolving these cases on summary judgment if possible. See, e.g., Maressa v. N.J. Monthly, 89 N.J. 176, 196 (1982) ("The perpetuation of meritless actions, with their attendant costs, chills the exercise of press freedom. To avoid this, trial courts should not hesitate to use summary judgment procedures where appropriate to bring such actions to a speedy end."); Dairy Stores, Inc. v. Sentinel Publ'g Co., 104 N.J. 125, 157 (1986) ("[W]e recognize also that summary judgment practice is particularly well-suited for the determination of libel actions, the fear of which can inhibit comment on matters of public concern."); Khan, 710 N.Y.S.2d at 44 ("[S]ummary judgment is particularly favored by New York courts in libel cases.").

The imperatives favoring summary judgment in defamation cases fully apply when the relevant issue is actual malice. And summary judgment is routinely granted on actual malice grounds. See, e.g., DeAngelis v. Hill, 180 N.J. 1, 20 (2004); Rocci v.

Ecole Secondaire Macdonald-Cartier, 165 N.J. 149, 160 (2000); Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392, 423-26 (1995); Millus v. Newsday, Inc., 89 N.Y.2d 840, 843 (1996); Freeman, 84 N.Y.2d at 58; Kipper v. N.Y.P. Holdings Co., 852 N.Y.S.2d 56, 57 (App. Div. 2008); Sprewell v. NYP Holdings, Inc., 841 N.Y.S.2d 7, 10-11 (App. Div. 2007); Bement v. N.Y.P. Holdings, Inc., 760 N.Y.S.2d 133, 137 (App. Div. 2003); Farrakhan v. N.Y.P. Holdings, Inc., 656 N.Y.S.2d 726, 727 (App. Div. 1997); Suson v. NYP Holdings, Inc., No. 300605TSN2006, 2008 WL 927985, at *11 (N.Y. Civ. Ct. Mar. 31, 2008) (Pa1898-1907).

II. The Trial Court Properly Concluded That No Reasonable Jury Could Find by Clear and Convincing Evidence That O'Brien Acted with Actual Malice

A. The Trial Court Correctly Concluded, Based on the Undisputed Evidence, That O'Brien Did Not Entertain Serious Doubts About the Sources' Estimates

The trial court appropriately focused the actual malice inquiry on O'Brien's subjective state of mind. See Lawrence, 89 N.J. at 467-68 ("The focus of the 'actual malice' inquiry is on a defendant's *attitude* toward the truth or falsity of the publication, on his *subjective* awareness of its probable falsity, and his *actual* doubts as to its accuracy." (citations omitted)); Khan, 710 N.Y.S.2d at 44 ("[T]he actual malice test focuses on defendants' subjective state of mind."). Because none of the record evidence, interpreted in the light most favorable to plaintiff, shows that O'Brien subjectively

disbelieved the sources' estimates or recklessly disregarded evidence that proved those estimates false, the trial court properly granted summary judgment.

1. O'Brien Had Good Reason to Believe His Sources

Sprewell, a recent New York case, has very similar facts and strongly supports the trial court's ruling below. In Sprewell, the New York Appellate Division granted summary judgment to a reporter and publisher in connection with a newspaper story, based in part on confidential sources, about the cause of basketball player Latrell Sprewell's hand injury. The Sprewell court cited four factors in its decision finding no actual malice: (1) the article noted that the allegedly defamatory statements were based on information from confidential sources, and included Sprewell's denial of the information's accuracy; (2) the record demonstrated that the reporter subjectively believed the confidential sources; (3) the reporter attempted to verify or disprove the confidential sources' accounts by seeking information from other, non-confidential sources; and (4) plaintiff's explanations for his injury continuously changed over time. Sprewell, 841 N.Y.S.2d at 10-11.

As discussed in more detail below, all of the factors cited by the Sprewell court apply equally to O'Brien's reporting.[10] First, O'Brien included many different estimates of Trump's net worth (many of which were contradictory), in addition to the confidential sources' estimates, and cited Trump's denial of the sources' estimates.

Second, O'Brien has also testified that at the time of the Book's publication, he – like the reporter in Sprewell – subjectively believed that the sources' estimates were likely accurate. (Pa173 at 215:10-13 ("I had good reason to believe they felt the numbers were accurate, and I had very, very good reason to believe that they were.")); Sprewell, 841 N.Y.S.2d at 10.

Third, as in Sprewell, id. at 10-11, O'Brien based his belief in the sources' accuracy on a number of factors, including:

O'Brien confirmed the sources' background and access to Trump's financial information. Through research and interviews,

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[10] In a weak attempt to distinguish Sprewell, plaintiff suggests that the Sprewell court granted summary judgment only after defendant made a "substantial" factual showing of "extensive investigation." (Pb30.) In fact, the Sprewell court merely noted the reporter's investigative efforts – which were similar to O'Brien's – as a factor supporting summary judgment, and did not set any standard for the amount of research required for summary judgment. Sprewell, 841 N.Y.S.2d at 10-11. In any event, O'Brien's investigation was extensive.

O'Brien verified the sources' positions and their unique and substantial access to Trump's net worth information.[11] (Pa961-65; Pa130-31 at 44:10-48:25; Pa208 at 356:12-357:20; Pa288 at 670:9-20.)

The sources independently provided very similar net worth estimates. The fact that the three sources separately provided very similar net worth estimates was a substantial factor in O'Brien's determination that they were accurate. (Pa768-70, Pa788 (Source 1); Pa789-91 (Source 2); Pa795, Pa814 (Source 3)); see Clyburn v. News World Commc'ns, Inc., 705 F. Supp. 635, 642 (D.D.C. 1989) (finding no actual malice where confidential sources gave information that was consistent with other confidential sources).

O'Brien verified other information on Trump's finances provided by the sources. The three sources provided other detailed information on Trump's business and financial dealings

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[11] Plaintiff has pointed to no evidence in the record that would support his claim that O'Brien knew or should have known the sources' information was outdated. (Pb38.) O'Brien testified that – following his September 2004 article, but before the Book's publication – he contacted the sources for any updated information. (Pa202 at 330:10-17; Pa205-08 at 342:24-354:11; Pa117 ¶ 8; see also Pa788; Pa814-15 (O'Brien's notes of such interviews).) In addition, even if the sources did not have access to Trump's financial information in 2005, publication of dated information could not constitute evidence of actual malice unless O'Brien, because of the dated nature of the information, had a subjective disbelief in the information. Nothing in the record would support such a finding.

that O'Brien was able to verify through other sources or documents.[12] See Southwell v. S. Poverty Law Ctr., 949 F. Supp. 1303, 1307-08 (W.D. Mich. 1996) (finding that confidential source's ability to provide other information that proved correct "supports defendant's reasonable reliance on this source").

In addition, as in Sprewell, it is undisputed that O'Brien engaged in significant research in connection with the Book, conducting (primarily or through his research assistant) more than 100 interviews and engaging in extensive documentary research. (See, e.g., Pa116-17 ¶ 8; Book at 242, 249-63; Pa701-10, Pa715-37.)

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[12] As detailed in discovery responses, the verifiable information provided by the sources includes information about: (1) plaintiff's interest in the limited partnerships that owned the West Side Yards; (2) plaintiff's negotiations with Hilton in the mid-1990s regarding the potential sale of plaintiff's casino company; (3) plaintiff's business dealings with Kenneth Shapiro and Daniel Sullivan, two organized crime figures; (4) negotiations regarding the restructuring of Trump Hotels and Casino Resorts, Inc. in 2004; (5) the sale of Trump's father's real estate portfolio in Brooklyn in 2004; (6) plaintiff's interest in 40 Wall Street in New York and the level of borrowings relating to that property; (7) plaintiff's interest in the GM Building in New York and litigation surrounding that interest; (8) plaintiff's interest in Trump International Hotel and Tower in New York; (9) plaintiff's borrowings from ULLICO in connection with his Mar-a-Lago club in Palm Beach; and (10) plaintiff's financial condition and the restructuring of plaintiff's outstanding debt during certain periods. (Pa961.)

Fourth, Trump's estimates of his net worth, like Sprewell's explanations for his injury, changed continually over time. (See supra, Facts at 6-8.)

2. O'Brien Is Entitled to Rely on the Confidential Sources to Rebut Actual Malice

Trump suggests that O'Brien was not entitled to rely upon the confidential sources in support of summary judgment, given O'Brien's reliance on the New Jersey newsperson's privilege and New York shield law to protect their identities, and implies that the jury would have been entitled to infer that the confidential sources did not exist. (Pb2-3, Pb17 n.8.) The court below properly rejected plaintiff's arguments and credited O'Brien's reliance on the confidential sources. (T38-17 to 41-10.)

Under both New Jersey and New York law, a defendant in a defamation suit is entitled to use his reliance on confidential sources to rebut a claim of actual malice – even if properly invoking the newsperson's privilege to protect the sources' identities – and reliance on the privilege cannot support an inference that the sources did not exist. Maressa, 89 N.J. at 198; Sprewell, 841 N.Y.S.2d at 10-11. Further, plaintiff points

to no evidence in the record that would support his speculation that the sources do not exist.[13]

In New Jersey, the law is clear that a reporter's invocation of the newsperson's privilege does not prevent him from asserting reliance on confidential sources. Maressa, 89 N.J. at 193, 198 ("Contrary to states without a Shield Law, in New Jersey a media defendant's refusal to name its source cannot support an inference that no source existed."); Resorts Int'l, Inc. v. NJM Assocs., 89 N.J. 212, 215-16 (1982) ("As we acknowledged in Maressa, the Shield Law makes it more difficult for libel plaintiffs to prove their case.").

Plaintiff focuses on language from Maressa (Pb27 (quoting Maressa, 89 N.J. at 198-99)), which requires trial courts, even when a defendant has relied on a confidential source, to "consider whether the circumstances surrounding the

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[13] Notwithstanding that the Book states O'Brien spoke to sources "on background [who] asked not to be identified" (Book at 241), and the obvious motive to remain anonymous given Trump's well-known litigiousness and threats to sue the sources (Pa644 at 520:10-521:14), plaintiff claims that the absence of an endnote in the Book identifying the dates or locations of O'Brien's interviews of anonymous sources "raises serious questions as to whether these sources actually exist" (Pb17 n.8). But in the context of the privilege appeal, this Court previously rejected plaintiff's attempt to draw the inference from the lack of an endnote that O'Brien had not promised them confidentiality. Trump, 403 N.J. Super. at 300. The Court similarly should reject plaintiff's current claim. The obvious explanation is that O'Brien omitted such information as a further safeguard to protect the sources' identities.

publication," including the character of the allegedly defamatory statement and the evidence of recklessness, "warrant submission of the question of actual malice to the jury." Maressa, 89 N.J. at 198-99. But this language does not preclude reliance on a confidential source to rebut actual malice; instead, it requires the court to do exactly what the trial court did here. The trial court carefully considered the other information in O'Brien's possession, and the allegations of deficiencies in O'Brien's investigation, and concluded properly that the evidence was insufficient to demonstrate that O'Brien entertained serious doubts regarding the sources' estimates. (T21-12 to 42-8.)

Like New Jersey law, New York law also permits defendants to rely on confidential sources in support of summary judgment on actual malice. See Sprewell, 841 N.Y.S.2d at 10-11 (allowing defendant on summary judgment to rely on confidential sources to rebut allegation of actual malice); Bement, 760 N.Y.S.2d at 137 (same); Suson, 2008 WL 927985, at *10-11 (same); see also Southwell, 949 F. Supp. at 1307-10 (granting summary judgment where defendant relied on conversations with undisclosed confidential source, notes of which were sufficiently consistent and detailed to justify reliance).[14]

[14] Plaintiff ignores all of the more recent New York case law that permits reliance on confidential sources, instead citing an

3. O'Brien Had Good Reason to Disbelieve Plaintiff

Plaintiff argues that O'Brien should have entertained serious doubts about the sources' estimates because "reliable information from independent sources" contradicted their estimates. (Pb37.) But plaintiff has not identified any such independent sources. All of the information to which plaintiff points ultimately came from Trump himself, and O'Brien had good reasons to disbelieve Trump's own estimates of his net worth and other assertions about his finances.

First, it is undisputed that Trump's own net worth estimates varied substantially over the time that O'Brien reported on him. (See supra, Facts at 6-8.) Trump testified during this litigation that he believes his net worth can change from day to day, even if there is no change in his holdings, based simply on his own feelings and attitudes. (Pa522 at 34:7-24 ("My net worth fluctuates, and it goes up and down with markets and with attitudes and with feelings, even my own feelings . . . . Yes, even my own feelings, as to where the world is, where the world is going, and that can change rapidly from day to day.") (emphasis added).) Unsurprisingly then, Trump's own estimates varied widely over time. O'Brien reported

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older New York case that recent rulings have not followed. (See Pb29 (citing Sands v. News Am. Publ'g, 560 N.Y.S.2d 416, 420-21 (App. Div. 1990)).)

in the Book about estimates from Trump, his CFO, and related sources that ranged from $1.7 billion to $9.5 billion in the span of months. (Book at 153-55.)

Second, it is undisputed that O'Brien was aware of Trump's longtime reputation for exaggeration, especially about his net worth, including the following statements in previously published articles written by other journalists:

- Washington Post: "[Trump has] described himself as 'a billionaire many times over,' but who knows? There are skeptics out there who believe Trump has $300 million, tops. And the guy has a reputation for, let's say, shading the news in a light that reflects his enthusiasms." (Pa980.)

- Time Magazine: "How rich is the Donald? To interviewers, he hints that his wealth is somewhere between $2 billion and $6 billion. Rival developers estimate it's nowhere near even the lower figure." (Pa986.)

- Fortune: "That difficulty is compounded by Trump's astonishing ability to prevaricate. . . . The predictable result is the steady stream of articles debunking Trump's exaggerated claims – particularly his oft-repeated assertion that he's worth $5 billion." (Pa992.)

- Wall Street Journal: "He puts his net worth at $5 billion . . . . But a look at the major sources of his wealth, including the Trump Place apartment development on New York City's west side, the 70-story Trump World Tower project and the midtown General Motors Building, shows that several of his billions are based on profits that are far in the future . . . ." (Pa1001.)

Trump's deposition testimony confirmed that his reputation for exaggeration is well-founded. (Pa526 at 50:14-20 ("Q: Have you

ever exaggerated in statements about your properties? A: I think everyone does.").)

Third, while Trump claims that O'Brien had independent, objective evidence confirming his net worth, he made the very same argument below to no avail. The undisputed evidence showed that Trump, whose holdings are private, never provided O'Brien verified information on his liabilities, without which it is impossible to determine net worth. The supposed "independent source[]" (Pb37) cited by plaintiff is Trump's 2004 Statement of Financial Condition ("SOFC") (Pb10-12, Pb28, Pb37, Pb39, Pb42), which Trump claims he showed O'Brien on multiple occasions (and which O'Brien denies seeing).

But even if O'Brien had seen the SOFC, the SOFC states on its face that it was created by Trump's accountants based on Trump's own estimates of his assets and liabilities. (Pa3661 (noting that the SOFC is a "compilation" and "the representation of the individual whose financial statements are presented," and that the accountants "have not audited or reviewed" the SOFC and "do not express an opinion or any other form of assurance on it").) Indeed, Trump's outside accountant, Gerald Rosenblum, who assisted in compiling the 2004 SOFC, testified that he had not verified the information in it and could not be certain that it was complete. (Pa3776 at 113:8-11 ("I'm not certain to this day that I was aware of all of Mr. Trump's liabilities at that

point in time, and I sought no corroboration.").) In addition, as the trial court correctly observed, the SOFC deviates from generally accepted accounting principles ("GAAP"), and warns the user that "they might reach different conclusions about the financial condition of Donald J. Trump if they had access to a revised statement of financial condition prepared in conformity" with GAAP. (T28-17 to 29-3.) Accordingly, even assuming O'Brien had seen the SOFC, it was not "reliable evidence from independent sources." The trial court properly found that plaintiff's evidence could not establish that O'Brien had entertained serious doubts about the sources' estimates, even had he seen the SOFC.[15] (T38-13 to 16.)

4. O'Brien Discussed Various Estimates of Plaintiff's Net Worth, and Was Not Obligated to Accept Plaintiff's Claims at Face Value

Plaintiff's argument essentially boils down to the proposition that O'Brien's failure to take Trump's word for his net worth, whether in the form of his own statements, his employees' statements, or his SOFC, constitutes actual malice.[16]

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[15] Plaintiff also claims that his employees provided O'Brien with "significant liability information" for his club properties in April 2005 (Pb39), but it is undisputed that the documents in question, some of which were almost ten years old, gave no current information on loan balances, and were insufficient to establish the extent of Trump's overall liabilities (see, e.g., Pa3685-741; Pa3742-52).

[16] Plaintiff also claims that Forbes Magazine's estimate of Trump's net worth at $2.7 billion (published more than a month

(Pb37-39.) But the law is clear that publication of a statement in the face of a plaintiff's denial does not constitute actual malice. Edwards v. Nat'l Audubon Soc'y, Inc., 556 F.2d 113, 121 (2d Cir. 1977) ("Surely liability under the 'clear and convincing proof' standard of New York Times v. Sullivan cannot be predicated on mere denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error."); Sprewell, 841 N.Y.S.2d at 10-11. Nor is publication in the face of a contradictory source proof of actual malice. Liberty Lobby, 1991 WL 186998, at *8 (no clear and convincing evidence of actual malice where defendant was aware of a contradictory article); Coliniatis v. Dimas, 965 F. Supp. 511, 518-19

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after the Book was published, and therefore not a source that O'Brien could have relied on) shows that O'Brien should have reached a different conclusion. (Pb37; Pa2138.) But the fact that different journalists reached different conclusions – based on information provided by Trump – proves nothing about O'Brien's mental state at the time of publication and is not evidence of actual malice. See Sullivan, 376 U.S. at 287 (presence in defendant newspaper's files of articles that contradicted the challenged publication did not establish actual malice); Liberty Lobby, Inc. v. Anderson, Civ.A. No. 81-2240, 1991 WL 186998, at *8 (D.D.C. May 1, 1991) (Pa3848-56) (defendants' knowledge of a Washington Post article contradicting their published source did not constitute clear and convincing evidence of actual malice); see also Costello, 136 N.J. at 617 ("Sufficient evidence does not exist, however, when the only evidence offered is that the defendants 'should have known the articles were false, or they at least should have doubted their accuracy.'") (quoting Lawrence, 89 N.J. at 457).

(S.D.N.Y. 1997) (no actual malice even though defendant knew that a witness had denied that the alleged bribery request had been made).

Like the reporter in Sprewell, O'Brien "sought to verify or disprove the [sources'] claims, by seeking comments from plaintiff . . . and speaking with personnel within the [plaintiff's] organization," as well as interviewing third parties. Sprewell, 841 N.Y.S.2d at 10-11. O'Brien confronted Trump with the sources' estimates and printed his response (Book at 154); interviewed Trump Organization CFO Allen Weisselberg and printed what he said, including a detailed chart of Weisselberg's estimates (id. at 155);[17] attempted to confirm the confidential sources' reliability by interviewing other sources (Pa961-65; Pa208 at 356:12-357:20); and printed the many different estimates of Trump's net worth (Book at 150-55).

The court below recognized the significance of the context in which O'Brien reported the confidential sources' estimates, noting:

> If, for example, O'Brien had published only the estimates of Trump's net worth that had been supplied to O'Brien by the confidential sources and no other information or

[17] Although Weisselberg disputes some of the Book's details, it is undisputed that he discussed valuations with O'Brien and gave him valuations that appear in Chapter Six. (See Pa833 at 241:2-21; Pa835-86 at 257:25-258:8; Pa837 at 262:2-6, 265:3-8; Pa838 at 268:16-269:6; Pa840 at 274:6-25; Book at 155.)

> estimates that O'Brien had obtained as a result of his investigation, including the significant number of estimates suggesting that Trump is a billionaire, the result may have been different. That is not the case here where O'Brien did publish various billionaire estimates.

(T36-9 to 17.) Thus, O'Brien was not required to "resolve the discrepancies" (Pb41) between the sources' and Trump's estimates by printing only what Trump said, and properly provided the reader with the full spectrum of views on Trump's net worth.

B. The Trial Court Correctly Concluded There Were No Disputed Material Issues of Fact That Precluded Summary Judgment

1. Allegations of Insufficient Investigation Did Not Establish Actual Malice

Plaintiff alleges here, as he did below, that O'Brien conducted an insufficient investigation and purposefully avoided the truth about Trump's net worth. (Pb9-15, Pb40-44.) However, as the trial court correctly noted, numerous courts have concluded that claims of failure to investigate are inadequate to defeat summary judgment as to actual malice. (T33-14 to 24 (citing Turf Lawnmower, 139 N.J. at 392; Sweeney, 84 N.Y.2d at 786; DeAngelis, 180 N.J. at 1).)

The trial court used Turf Lawnmower to illustrate the tremendous "hurdle" faced by a defamation defendant in proving actual malice through alleged deficiencies in a defendant's

investigation. In describing Turf Lawnmower, the trial court noted:

> Despite the fact that a tape recorder had apparently been selectively utilized and that tapes had been destroyed, despite the fact that the defendants had failed to interview any sources who might be favorable to the plaintiff, despite the fact that the defendants' own expert had concluded that the test that the defendants had relied upon had not been conducted scrupulously and despite noting that the record confirmed that many of the criticisms of the defendants' actions by the plaintiffs' experts were valid, in affirming the grant of summary judgment, the Court concluded, "Although we agree with the Trial Court that defendants' methods may have been negligent or even grossly negligent, we find that plaintiffs have failed to prove that defendant ever doubted that Turf's conduct constituted serious consumer fraud practices."

(T35-2 to 18 (citing Turf Lawnmower, 139 N.J. at 424-36).)

Far from the facts of Turf Lawnmower, as discussed above, the evidence shows that O'Brien conducted an extensive investigation. As plaintiff himself acknowledges, O'Brien conducted more than 25 interviews of Trump. (Pb9.) O'Brien also interviewed past and present Trump employees and others in the real estate industry (Pa701-10; Pa116-17 ¶ 8; Book at 242, 249-63), and reviewed public records and other documents,

including previously published articles and books (Pa116-17 ¶ 8; Book at 249-63; Pa714-37).[18]

Plaintiff claims that O'Brien's alleged failure to review documents made available to him at an April 21, 2005 meeting in plaintiff's conference room is evidence of actual malice. (Pb10-14, Pb39-40.) Even if it were true – which it is not – that O'Brien failed to review any of these documents, such failure could not be proof of actual malice as to Trump's net worth. Weisselberg, plaintiff's own CFO, testified that there were "no documents relating to net worth" (Pa3756 at 167:7-168:19), and Weisselberg, Trump's in-house counsel Michelle Lokey, and Trump himself testified that the documents were assembled to show Trump's ownership of properties, and not overall net worth (Pa3757 at 179:18-180:10 (Weisselberg); Pa3768 at 43:20-45:21 (Lokey); Pa524 at 44:3-7 (Trump)). Nor has Trump pointed to any evidence that would show that review of these

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[18] Plaintiff attempts to make an issue of the research conducted by O'Brien's research assistant. (Pb15, Pb28.) But this issue is irrelevant to O'Brien's subjective belief of the sources' estimates. Plaintiff's apparent point is that O'Brien could have done more extensive research, but insufficiency of research does not establish actual malice. Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069, 1090 (3d Cir. 1988) ("Mere evidence that a media defendant did not investigate properly does not rise to the level of actual malice."). In addition, it is undisputed that O'Brien did not simply rely on his research assistant for research on Trump's net worth, but did extensive research on Trump's finances himself. (Pa115-16 ¶ 5; Pa293-94 at 691:14-694:6; Pa295-96 at 698:14-704:14.)

documents would have alerted O'Brien to the inaccuracy of the sources' estimates. Thus, these documents did not reveal Trump's net worth, and O'Brien's purported failure to review these documents could not have amounted to reckless disregard for the falsity of the sources' estimates.

Furthermore, plaintiff's false claims that O'Brien lied about when certain notes were taken, and the existence of certain tape recordings, are irrelevant.[19] As the trial court correctly noted (T35-19 to 36-2), the relevant inquiry in considering allegations of inadequate investigation is the question of O'Brien's subjective belief, not whether defendant's actions were negligent. See Turf Lawnmower, 139 N.J. at 426, 434; Bement, 760 N.Y.S.2d at 137 (no evidence that defendant doubted story, although he failed to read key document and made minimal efforts to verify its accuracy). Even if these allegations are accepted as true, they do not demonstrate that O'Brien entertained serious doubts about the sources' estimates.

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[19] In one particularly egregious example of a distortion of the record, plaintiff claims that O'Brien denied taping an interview of Weisselberg, notwithstanding that O'Brien actually produced the audio recording of this interview to plaintiff in discovery, which plaintiff then submitted to this Court as part of the record. (Pb13-14; Pa444-45; Pa3650a; see also Pa3816.)

2. Alleged Admissions and Inaccuracies Did Not Establish Actual Malice

Plaintiff also alleges that O'Brien made admissions regarding the value of certain assets (Pb34-36) and that certain alleged inaccuracies in the Book likewise are evidence of actual malice (Pb17-18). Plaintiff made these same allegations before the trial court, which considered and correctly rejected them. (T8-7 to 9, T29-9 to 30-2, T32-19 to 23, T41-22 to 42-8.)

West Side Yards. Central to plaintiff's argument is O'Brien's alleged concession in a June 2005 conversation with Lokey, Trump's in-house counsel, that Trump owned a 30 percent stake in the West Side Yards that was worth $450 million to $500 million. (Pb14-15, Pb34-35.) O'Brien made no such concession. But even assuming for the purposes of this motion that he had, knowledge of a single asset's value – in isolation from the value of other assets and liabilities – would not have allowed O'Brien to reach any conclusion regarding Trump's overall net worth. After all, plaintiff could well have borrowed against this interest, or had other debt greater than the value of his West Side Yards interest, particularly given Trump's past history of overleveraging his holdings. Without a verified, third-party accounting of Trump's overall liabilities (see supra Section II.A.3), which O'Brien indisputably did not have, O'Brien could not have determined Trump's net worth from

the value of a single asset, such as Trump's West Side Yards interest. Therefore, even had O'Brien made such a concession, it does not show that he entertained serious doubts about the sources' estimates.

Relatedly, plaintiff makes much of the Book's supposed inaccurate statements about Trump's interest in the West Side Yards. But Trump conceded at his deposition that he was a "limited partner" with a 30 percent limited partnership interest in the project (Pa524 at 43:13-44:2; Pa529 at 62:25-63:23; see also Pa2291-394), which is consistent with the Book's description of his interest (Book at 165 ("[T]he Hong Kong group merely promised to give him a 20 to 30 percent cut of the profits once the site was completely developed.")). Trump's quarrel with O'Brien's description of his interest in the West Side Yards is semantic, i.e., whether Trump's "limited partnership interest" is properly characterized as "ownership" or not. That O'Brien viewed a limited partnership, with limited control and rights to profits, as less than full "ownership" does not amount to proof of actual malice or cast doubt on the confidential sources' credibility. (See Pb37-38; Pa768-69; Pa787.)

Brand Name. Plaintiff claims that O'Brien admitted that Trump's brand name was "bigger than Coke and Pepsi." (Pb35.)

Even if O'Brien had made such a statement, which he did not,[20] it could not bear on actual malice. Trump's own SOFC did not include his brand in its net worth valuation, noting that GAAP did not permit inclusion of brand value as a personal asset. (Pa3665 ("Pursuant to generally accepted accounting principles, these financial statements do not reflect the value of Donald J. Trump's worldwide reputation.").) Trump's outside accountant also explained in his deposition that brand name is not included in net worth because the value of a brand name is ill-defined or contingent on future services. (Pa3778 at 123:5-19.) Thus, the value of Trump's brand is irrelevant to Trump's net worth under GAAP, and its omission cannot be evidence of actual malice.

40 Wall Street. O'Brien published the New York tax assessor value for 40 Wall Street as one data point in evaluating Trump's claim that the building was worth more than four times that assessment value. (See Book at 171-72.) Plaintiff does not dispute that O'Brien published the correct tax assessor number, but claims that its publication constitutes "false information" because, according to plaintiff, O'Brien concludes that the building "essentially had no value." (Pb17-

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[20] Plaintiff mischaracterizes an audiotaped conversation (Pa3649a) in which O'Brien asked Trump about a just-published Business Week article titled "Trump: Bigger Than Coke or Pepsi?," which quoted Trump as saying that he thinks his brand is now bigger than Pepsi-Cola or Coca-Cola. (Pa3817.) O'Brien never made that statement or any similar statement.

18.) The Book contains no such conclusion. (Book at 171-72.) In any event, O'Brien's truthful reporting on 40 Wall Street sheds no light on his subjective belief in the truthfulness of the sources' net worth estimates.[21]

3. Allegations of Common-Law Malice and Bias Did Not Establish Actual Malice

Finally, Trump repeats his claim that O'Brien published negative articles about him in the year leading up to the Book. (Pb45-46.) But Trump never brought suit in connection with any allegedly defamatory statement in these articles, and, following these articles, Trump cooperated with O'Brien on the Book. Plaintiff also claims that O'Brien published other injurious statements in the Book, unrelated to net worth, which he has not asserted were defamatory. (Pb46.)

Here, again, the trial court properly concluded that these allegations were insufficient to defeat summary judgment. Common-law malice, standing alone, cannot prove the existence of actual malice. Greenbelt Coop. Publ'g Ass'n v. Bresler, 398

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[21] In addition to the alleged admissions and inaccuracies discussed above, plaintiff assails O'Brien for updating the value of Trump's casino holdings in The Times excerpt, but not the Book itself, which was publicly released three days later. (Pb18.) O'Brien's effort to keep his newspaper reporting accurate in the face of changing circumstances cannot possibly indicate that he disbelieved the sources' estimates as published in the Book. To the contrary, O'Brien's inclusion of this update demonstrates his conscientiousness in attempting to report accurate information.

U.S. 6, 10 (1970) (holding that "spite, hostility or deliberate intention to harm" is "constitutionally insufficient" to support a finding of actual malice); Blum v. New York, 680 N.Y.S.2d 355, 357 (App. Div. 1998). Even in combination with other evidence, common-law malice is evidence of actual malice only if it supports a conclusion that the defendant subjectively believed that his statement was false or had serious doubts about its truth at the time of publication. DeAngelis, 180 N.J. at 14; Blum, 680 N.Y.S.2d at 357.

The trial court carefully reviewed plaintiff's alleged evidence of common-law malice, including O'Brien's allegedly negative articles and allegedly derogatory comments about Trump, and properly concluded that they did not establish clear and convincing evidence of actual malice. Any derogatory comments about Trump or prior negative reporting bore no relation to O'Brien's subjective belief in the confidential sources' estimates. See, e.g., Tavoulareas v. Piro, 817 F.2d 762, 795-96 (D.C. Cir. 1987).

* * *

Because the trial court correctly found that plaintiff had not adduced clear and convincing evidence of actual malice as to O'Brien, and because plaintiff's moving brief cites no law or evidence that undercuts the trial court's conclusion, this Court should affirm the grant of summary judgment as to O'Brien.

III. The Trial Court Correctly Concluded That No Reasonable Jury Could Find the Warner Defendants Vicariously Liable for O'Brien's Allegedly Defamatory Statements

Trump below abandoned all claims against the Warner defendants based on direct liability and proceeded exclusively on a vicarious liability theory. (T42-23 to 43-4.) Because any potential liability was based solely on vicarious liability, the court's grant of summary judgment for O'Brien compelled the same result for the Warner defendants. But even had the court denied summary judgment for O'Brien, it concluded summary judgment for the Warner defendants was required because, as a matter of law, O'Brien was an independent contractor, and the Warner defendants therefore were not vicariously liable for O'Brien's actions. (T55-16 to 20.)

A. O'Brien's Relationship with the Warner Defendants Embodies the Traditional Elements of an Independent Contractor in the Publishing Industry

A defendant who hires an independent contractor is not vicariously liable for injuries caused to third parties by that independent contractor. See, e.g., Bahrle v. Exxon Corp., 145 N.J. 144, 156 (1996); Lazo v. Mak's Trading Co., 605 N.Y.S.2d 272, 274 (App. Div. 1993), aff'd, 84 N.Y.2d 896 (1994); Nelson v. Globe Int'l, 626 F. Supp. 969, 977-78 (S.D.N.Y. 1986). There is no factual or legal support for plaintiff's argument that O'Brien was the Warner defendants' agent, as opposed to an

independent contractor, and there is overwhelming and undisputed evidence to the contrary.

As plaintiff concedes, the "key inquiry" in determining whether O'Brien was an independent contractor is whether the Warner defendants were able to control the relevant conduct (i.e., researching and writing the Book). (Pb48 (citing Mazart v. State, 441 N.Y.S.2d. 600, 604-05 (Ct. Cl. 1981))); see also Nelson, 626 F. Supp. at 978 ("[I]f the employer can only control the result (even the details of the result), the worker is an independent contractor."); accord Mavrikidis v. Petullo, 153 N.J. 117, 131 (1998). The Nelson decision, cited by both plaintiff (Pb48-49) and the court below (T48-10 to 49-10, T49-25 to 50-10, T53-12 to 17), is particularly instructive.

In Nelson, the court considered the potential vicarious liability of a newspaper publisher that had proposed the topic of an allegedly defamatory article and "restated, in more readable form, the factual assertions contained in [the writer's] copy." Nelson, 626 F. Supp. at 978-79. The court found that an independent contractor relationship existed, and therefore the publisher had no vicarious liability, focusing on the facts that the author: (1) "controlled the manner in which the article was written"; (2) "selected and interviewed sources"; (3) "chose the words, style, and order of his finished copy"; (4) "was paid a flat . . . fee for the article"; (5) "was

not salaried"; (6) "worked out of his own office"; (7) "used his own research materials"; (8) "contacted sources on his own telephone"; and (9) "typed copy on his own typewriter." Id. at 978; see also Pukowsky v. Caruso, 312 N.J. Super. 171, 182 (App. Div. 1998) (applying similar factors under New Jersey law).

As the court observed below, the application of these factors to the undisputed facts of this case overwhelmingly establishes that O'Brien was an independent contractor: O'Brien selected the Book's content and conducted his research independently; provided his own workspace and equipment; received no salary or benefits from the Warner defendants; did not have income taxes withheld by the Warner defendants; and was in no way subject to the control of the Warner defendants. (See T51-10 to 52-17.)

Further underscoring the complete absence of an agency relationship, plaintiff has not cited even a single case in which a book publisher was found vicariously liable for the acts of its author.[22] See, e.g., Price v. Viking Penguin, Inc., 881

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[22] Plaintiff cited only two defamation cases in which courts found employers vicariously liable, both of which involved defendants who (unlike O'Brien) were traditional employees and not independent contractors. (Pb48 (citing Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 253-54 (1974) (concerning a reporter employed by newspaper as staff writer); Loughry v. Lincoln First Bank, N.A., 67 N.Y.2d 369, 375 (1986) (addressing statements made by a manager and a security officer who were classic employees of defendant bank)).)

F.2d 1426, 1446 (8th Cir. 1989) (finding no vicarious liability for book publisher); Secord v. Cockburn, 747 F. Supp. 779, 787 (D.D.C. 1990) (same).

B. The Evidence Identified by Plaintiff Does Not Support a Finding of Vicarious Liability

Unable to demonstrate agency under the Nelson factors, and having not deposed a single member of the Warner defendants' editorial staff, plaintiff identifies three bases for claiming an agency relationship between O'Brien and the Warner defendants: (1) provisions of the book contract; (2) certain editorial involvement, including as allegedly reflected in materials identified in defendants' privilege logs, as well as the Warner defendants' legal review of the Book; and (3) marketing and promotional activities in which plaintiff claims the Warner defendants participated. None of these bases supports the existence of an agency relationship.

Book Contract. Plaintiff argues that the Warner defendants' right under the contract to reject the final draft of the Book rendered O'Brien the Warner defendants' agent.[23] (Pb50; see Pa505 § 6(c).) To the contrary, as the court below

[23] In quoting section 6(c) of the contract (Pb50), plaintiff omits the first sentence, which clearly limited the Warner defendants' input to the "final manuscript" and not O'Brien's process for researching and writing the Book: "Following delivery . . . of the complete and final manuscript of the Work . . . the Publisher shall notify the Author whether the Work is acceptable." (Pa505 § 6(c) (emphasis added).)

noted, "[t]he Warner defendants' ability to accept or reject O'Brien's final product is indicative of an independent contractor relationship." (T52-14 to 17 (citing Nelson, 626 F. Supp. at 978).) Moreover, the book contract clearly evinces an intent not to create an agency relationship, providing for the transfer of intellectual property rights in exchange for an advance and royalties. (Pa501-03 §§ 1-3.) O'Brien's independent contractor status is underscored further by the contractual warranties and indemnities affirming his sole responsibility for the Book's content and accuracy. (Pa509-10 §§ 17, 18.) In short, the Book contract demonstrates an independent contractor relationship.

Editorial Involvement. Plaintiff cites to the Warner defendants' input into the title and photo spread (Pb50-51), as well as defendants' privilege logs – which reflect newsgathering and editorial materials that this Court held were properly withheld under the newsperson's privilege – as evidence of an agency relationship between the Warner defendants and O'Brien (Pb49). However, even if the privilege logs could be relied upon as evidence – which they cannot be[24] – and even if the

[24] Privilege logs are not evidence and function only to assist the court and parties in assessing claims of privilege. See R. 4:10-2(e)(1) (providing that a privilege log's purpose is to "enable [plaintiff] to assess the applicability of the privilege or protection"); (Pa2879 ("[T]his log is provided solely to enable the Court and plaintiff to assess defendants' claims of

Warner defendants had input into the title of the Book and made suggestions to O'Brien as he was writing the Book, this still would not show that the Warner defendants controlled the means by which O'Brien researched and wrote the Book. As the trial court noted, such editorial suggestions would be insufficient to create an agency relationship. (T53-12 to 54-5 (citing Nelson, 626 F. Supp. at 978 (no vicarious liability despite the publisher's having proposed and edited the allegedly defamatory publication))); see also Ortiz v. Valdescastilla, 478 N.Y.S.2d 895, 897-99 (App. Div. 1984) (no vicarious liability where publisher conducted editorial review of allegedly defamatory article).

In addition, that the Warner defendants elected to conduct a legal review of the Book before publishing it, as the lower court noted, does not create an issue of fact as to O'Brien's status as an independent contractor. (T53-23 to 54-5.) Rather, it illustrates the Warner defendants' good faith belief that their independent contractor's work was reliable. See Goldblatt v. Seaman, 639 N.Y.S.2d 438, 440 (App. Div. 1996). The legal review — conducted after the Book was written — also underscores the Warner defendants' limited role in accepting the final

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privilege [and] is non-testimonial . . . ."). Plaintiff cannot rely on the logs to establish agency, and his attempt to do so highlights the complete absence of any supporting evidence.

product rather than influencing how O'Brien researched or wrote the Book.

Marketing and Promotion Activities. Similarly, as the court below recognized, the Warner defendants' efforts to market and promote the Book have no relevance to whether O'Brien acted as an independent contractor in authoring the Book. (T54-20 to 55-5 ("[T]he organization and execution of the marketing campaign for the book does not pertain to the means by which the book was created.").) The marketing and promotion of the Book took place completely apart from and after O'Brien's researching and writing of the Book, and cannot convert O'Brien into the Warner defendants' agent.

* * *

The trial court correctly determined that no reasonable jury could find the Warner defendants vicariously liable for O'Brien's actions because the undisputed evidence shows that he was an independent contractor. In addition, because there is no primary liability for O'Brien, there can be no vicarious liability for the Warner defendants. (T55-23 to 56-11 (citing Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 546 (1980)).) Accordingly, the trial court's decision to grant summary judgment to the Warner defendants should be affirmed.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court affirm the trial court's order granting summary judgment to defendants and dismissing plaintiff's complaint with prejudice.

Dated: February 15, 2010

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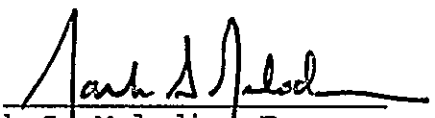
By: 
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DONALD J. TRUMP, Plaintiff/Appellant, v. TIMOTHY L. O'BRIEN, TIME WARNER BOOK GROUP INC., and WARNER BOOKS INC., Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO. A-6141-08T3 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: CAMDEN COUNTY DOCKET NO. CAM-L-545-06 Sat Below: HON. MICHELE M. FOX, J.S.C. *Civil Action* **CERTIFICATION OF SERVICE**

I certify that on this date, I caused the original and two copies of the following documents to be sent for filing to the Appellate Division Clerk's Office, Superior Court of New Jersey, Appellate Division, Hughes Justice Complex, 25 West Market Street, Trenton, New Jersey 08625, via overnight mail:

1. Brief of Defendants/Respondents Timothy L. O'Brien, Time Warner Book Group Inc., and Warner Books Inc., in Opposition of Appeal; and

2. This Certification of Service.

I further certify that on this date, I caused copies of the above-referenced documents to be sent via email and two copies of the above-referenced documents to be sent via overnight mail to counsel for Plaintiff/Appellant:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me is willfully false, I am subject to punishment.

Kellie A. Lavery

Kellie A. Lavery

Dated: February 15, 2010